No. 13.

Brief of Knaebel for Appellee

IN THE

SUPREME COURT

Filed Nov. 7, 1898.

OF THE

UNITED STATES.

OCTOBER TERM, 1898.

THE UNITED STATES,
Appellant,
vs.
MARIA DE LA PAZ VALDES DE CONWAY, ET AL.

No. 86.

BRIEF IN BEHALF OF APPELLEES.

JNO. H. KNAEBEL,
Of Counsel for Appellees.

The Denver City Publishing Co., Printers, 1514 Curtis Street, Denver
F. P. DUMARS, Manager.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1898.

THE UNITED STATES,
Appellant,

vs.

MARIA DE LA PAZ VALDES DE CONWAY, ET AL.

No. 80.

BRIEF IN BEHALF OF APPELLEES.

Statement.

This is an humble case, involving a tract of land of little value, and, therefore, as well as because of the self-evident merits of the decree from which the government has seen fit to take its delayed appeal, the claimants are content to submit their interests in

the premises upon the record, the elaborate opinion of the court below (*Transcript*, folio 131), and this short statement and argument.

The Court of Private Land Claims, on the twenty-fourth of October, 1895, confirmed the Cuyamungue Grant, New Mexico, "as a complete and perfect title to the extent of the boundaries called for in the grant and act of possession"—the same being a Spanish grant made on the second of January, 1731, and the lands affected having been actually possessed by the original grantees, their heirs and assigns, down to the present time; but, in its decree (*Trans.*, folio 128), the court provided that "this confirmation shall in nowise affect the rights of the Pueblos of Pojoaque and Nambé (if any they have), as between them and the said confirmees, under their patents issued by the United States government."

The provision as to the Indian Pueblos was inserted, because those Pueblos, like nearly all others in New Mexico, had, prior to 1860, presented to the surveyor-general of New Mexico, their several claims to *town grants*, each Pueblo, as a rule, asking *four square* leagues, on the alleged presumption that every town, Indian as well as Spanish, was entitled to that quantity of land. The testimony taken before the surveyor-general, in the Pojoaque case, is found at folio 121 of the Transcript, and, in the Nambé case, at folio 123. No documentary proof was offered in either case—only such vague oral testimony as "We claim one league from the corners of the church towards the four cardinal points, and are *entitled to the same amount of land as the other Pueblos*," and "we

claim one league in each direction from the four corners of the church." Doubtless these Pueblos had received from Spanish governors some papers describing the extent of their granted lands, but the Indian agents who had looked after the proceedings for confirmation pretermitted all serious effort towards their production, relying exclusively on the pretended presumption. The mischief of this course is seen in later cases (*e. g.*, Santa Clara) wherein Pueblo papers were discovered which were utilized in gaining, or attempting to gain, additional land for certain Pueblos outside of "presumed" grants already confirmed.

The fallacy attending these theoretic Pueblo titles is exposed by Mr. Justice Murray in his opinion (*Trans.*, folio 133 *et seq.*), as well as in his dissenting opinion in the Santa Fé case, and finally and definitively by this court in its opinion reversing the Santa Fé confirmation (*United States vs. Santa Fe*, 165 U. S. 675.). The two Pueblos were made parties defendant (*Trans.*, folio 124), and, after the decree, they moved to vacate it (*Ib.*, fol. 153), but, after due advisement, the motion was denied (*Ib.*, folio 155.). Nothing to the contrary appearing, the action of the court must be deemed competent and regular. (*Lutz vs. Linthicum*, 8 Pet. 165.)

No appeal has been taken by either the claimants or the defendant Pueblos, and the government delayed its appeal until the fourth of January, 1897 (*Ib.*, folio 157.).

Although we have not been favored with a copy of the government's brief, and the clerk, by letter

of the tenth of October inst., informed us that none had yet been filed, we assume that the facts as found by the Court of Private Land Claims in its opinion (*Trans., fols. 131, etc.*) are conceded, and that only a construction of statutory law is involved in the appeal; otherwise, we suggest a diminution of the record, since much evidence going to relevant matters of fact has been omitted in the perfunctory preparation of the record, for example, the evidence recited by Mr. Justice Murray (*Ib., fol.* 132, page 73) as to the proceedings of Governor Alencaster, in 1805, in vindication of the rights of the claimants under our grant as against neighboring Pueblo Indians, and even more significantly, the important matter referred to in an order of the court (*Ib.*, folio 124), in the following language:

> "And, further, as to certain original muniments of title produced from the custody of the claimants, introduced in evidence, that the annexed abstract thereof, in English, made by Mr. Henry O. Flipper [a federal agent], be taken and considered as the equivalent of the originals."

We understand that the government insists (although it has no beneficial interest in the question) that the court below should, by its decree, have undertaken to adjudicate that the Pueblo patents operated destructively on a part of our title.

ARGUMENT.

First.

The decree of confirmation having become final on the second of December, 1896, the date of the denial of the motion to vacate it—if, indeed, its finality does not date from its entry, the twenty-fourth of October, 1895—could never be reversed or disturbed by appeal on behalf of either the claimants or the defendant Pueblos, unless such appeal should be taken within six months from the said day of finality. (Land Court Act, 26 Stat., page 854, § 9.)

No such appeal has been taken, and the right to take it has been absolutely lost by lapse of time.

Second.

The present appeal was taken by the United States only—"the above-named defendant, the United States, considering itself aggrieved, * * * doth hereby appeal," etc. (*Trans:*, folio 157). But the United States has no possible concrete interest in the only question which it attempts to raise, namely, whether the court below should have excepted from the confirmation of our grant the parcels of land claimed by the Pueblos of Pojoaque and Nambé, respectively. It is manifest that, in view of the acquiescence of the claimants and the two Pueblos in the decree, the government is merely attempting to use its appeal as an instrumentality to secure an opinion on an *abstract* question; but such practice is intolerable.

The Indian Pueblos are corporations capable of suing and being sued.

> "The inhabitants within the Territory of New Mexico, known by the name of the Pueblo Indians, and living in towns or villages, built on lands granted to such Indians by the laws of Spain and Mexico, * * * are severally hereby created and constituted bodies politic and corporate, and shall be known in law by the name of 'Pueblo de ———,' (naming it), and by that name they and their successors shall have perpetual succession; sue and be sued, plead and be impleaded, bring and defend in any court of law or equity, all such actions, pleas and matters whatsoever, proper to recover, protect, reclaim, demand or assert the right of such inhabitants, or any individual thereof, to any lands, tenements or hereditaments possessed, occupied or claimed contrary to law, by any person whatsoever; and to bring and defend all such actions, and to resist any encroachment, claim or trespass made upon such lands, tenements or hereditaments, belonging to said inhabitants, or to any individual."
>
> (Compiled Laws of New Mexico, § 1304.)

The members of said Pueblos are not "Indians" in the ordinary sense of the term, but are citizens of the United States. (*United States vs. Lucero*, 1 N. M. 422; *United States vs. Santisteran*, *Ib.* 583; *United States vs. Joseph*, *Ib.* 593,—affirmed 94 U. S. 614.) And such "Indians" are not wards of the government in any just political sense, nor are they

within the letter or intent of the non-intercourse acts, or of the law or policy which put prohibitions and restrictions on contractual and other dealings between the tribal Indians and white men. *(Ib.)*

The Pueblo Indians are civilized—freeholders from time immemorial; but the tribal Indians are savages or barbarians, associated in *quasi*-autonomies suggesting some of the features of sub-sovereignty, and hence our government has always assumed the exclusive supervision and management of their affairs and struggled to save them from the interference of the whites. Dealings with such a subject pertain exclusively to the political department of the government, and are not adapted to judicial measures. See *Ely vs. Wilkins*, 112 U. S. 94; also *note* to 3 Stat. 709; 2 Story, Const., § 1933; and also the opinion of Mr. Justice Miller in *United States vs. Joseph*, 94 U. S. 614.

It seems to follow that the government's appeal should be dismissed.

Third.

The learned and admirable opinion of Mr. Justice Murray is worthy of being adopted as the opinion of this court. (*Trans.*, fol. 131.) Attention to his data and reasoning will show that he effectually destroys by argument every adverse position taken by the government.

Fourth.

All the justices below concurred in holding the grant to be complete and perfect, although a minor-

ity thought that, notwithstanding the perfection of the grant title, a confirmation ought (as claimed by the government) to be couched in such terms as to *destroy* our title (however rightful) to such parts of the grant as are covered by the *ex parte* surveys of the two Pueblos above named. This extraordinary suggestion of ruthless confiscation proceeds on the grounds next below stated and combated, viz:

1. The second subdivision of section 13 of the Land Court Act reads:

> "No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place."

The government, illogically confusing a "complete and perfect title" (immediately protected by the Constitution) with an executory "claim" dependent on the sense of justice of the political department, and misinterpreting the term "Indian title," contends that this clause of the act prevents a confirmation of our "complete and perfect" title.

(a) It is evident that the prohibition of the statute is to be gauged by the nature of the "claim" presented. The distinguished senator who was chiefly concerned in the passage of the statute always insisted that executory claims (called, indifferently, "inchoate," "incomplete," "imperfect" or "equitable" grants) are subjects of *political* discretion exclusively, and might be confirmed, either in whole or in part, or on condition, or rejected altogether, at the will or caprice of Congress, without infraction of

the Constitution; and, hence, as to such claims, he introduced into his bill the eleven leagues limitation, purely as a matter of economic policy, although that limitation was unknown in the Spanish law, and only to a limited extent in the Mexican law. But he always conceded (as this court has always conceded) that a "complete and perfect title" under Spain retained its dignity of character when transplanted to our dominion. The same plain proposition is conceded by the case of Botiller vs. Domingues, 130 U. S. 238, although the court, consistently therewith, held that it is notwithstanding competent, in securing a proper knowledge and delimitation of the public lands, for Congress, by appropriate legislation, to call on claimants of even perfect titles to present them for adjudication before an appointed tribunal. Accordingly, by section 8, it was enacted that the holder of a title that was "complete and perfect," at the date of the treaty of cession, "shall have the right *(but shall not be bound)* to apply to said court in the manner in this act provided for other cases for a confirmation of such title," etc. (26 Stat., page 854, § 8.) By this it was not intended to provide that the holder of such a title, in case he, at his option, or the government at its own, should present it for judicial consideration, must fall into the peril of losing (without compensation) any part of the lands fairly vested in him under that title. True, by section 14 of the statute, an attempt (probably unconstitutional) is made to compel the holder of a complete and perfect title, seeking its confirmation, to acknowledge prior government sales or grants

of any specific parcels of his property, however fraudulent or otherwise unjust such clouds might be; but, it will be noticed, this condition is mitigated by the government's promise to pay the grant holder, out of the national treasury, one dollar and a quarter for every acre of which he shall be divested in the arbitrary manner proposed. (26 Stat., page 854, § 14.) Manifestly, however, this provision had exclusive reference to cases in which the government had made an actual "sale" or "grant" of parcels believed by its officials to be public lands, and in which the government was bound in justice to protect its vendee or grantee; but the provision had no reference to the mere "quit-claims" or "releases" intended by either legislative or judicial confirmations of private land claims. In the act confirming the Pueblo claims of Pojoaque and Nambé (11 Stat. 374), it is expressly provided "that this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist." And the Land Court Act expressly provides (§ 8) that "no confirmation of claims or titles in this section mentioned shall have any effect other or further than as a *release* of all claim of title by the United States; and no private right of any person as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby;" and also (*subd.* fifth, § 13), that "no proceeding, decree or act under this act shall conclude or affect the private rights of persons as between each other, all which

rights shall be reserved and saved to the same effect as if this act had not been passed; but the proceedings, decrees and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands;" and, further (*subd.* sixth, § 13), that "no confirmation of or decree concerning any claim under this act shall in any manner operate or have effect against the United States otherwise than as a release by the United States of its right and title to the land confirmed, nor shall it operate to make the United States in any manner liable in respect of any such grants, claims or lands, or their disposition, otherwise than in this act provided."

Since the only cases, wherein compensation by the United States for private lands of which it had assumed to make disposition (Section 14), are expressed to be cases of *sales* and *grants*, no compensation could be demanded of the government by the holder of a perfect title for the "relinquishment," "quit-claim," or "release" to a stranger of any parcels of his estate, and his only protection against such intruders is his right (conceded in all the legislative confirmations as well as in the above provisions of the Land Court Act) to protect himself by invocation of the law of the land in the ordinary tribunals.

From the cited provisions, as well as from the general tenor of the statute, it is plain that the Land Court was not equipped with jurisdiction to settle conflicting claims of individuals, or to compare adverse private titles and decide between them, or,

finding a claimant to have a "complete and perfect title," to refrain from declaring and adjudicating such completion and perfection to the full extent made apparent by the original title papers according to the meaning and the force which they had at the date of the treaty. The language of section 14 confirms this proposition, for that section contemplates the possibility that *all* the lands "decreed to any claimant" may have been "sold or granted by the United States" to strangers, and, while it attempts (unconstitutionally) to render such decree ineffectual as against such sales and grants, still makes the decree itself a necessary condition precedent to an award of compensation for their loss This goes to show that, whatever limitation is attached by the statute to the *effect* of such a decree, it is still the duty of the court to construe the title of the claimant in harmony with its legal standing at the time when the treaty guaranteed its protection. See, on this point, the observation of this court in *United States vs. Chaves*, 159 U. S. 452, at page 465.

(b) Even if the villagers of Pojoaque and Nambé were tribal Indians, their title to any part of our grant could not be adjudicated as "*just.*" This is demonstrated clearly by Mr. Justice Murray in his opinion. He adds these pertinent observations (*Trans.*, fol. 136):

> "It would hardly be insisted under the facts of this case that the Pueblos of Nambé and Pojoaque had any just right to claim at the date of the treaty of Guadalupe Hidalgo any part of the land covered by this grant.

> It is equally clear that the United States did not acquire any right or interest in the land of the citizen in the ceded territory held by a complete and perfect title at the date of said treaty."

But it is unnecessary to discuss the question of the court's jurisdiction on the false assumption, even made *argumenti gratia*, that a Pueblo title is a "just and unextinguished Indian title or right," within the meaning of the statute. In our second point *(supra)* we have taken occasion to point out the difference of status between the civilized Indians of a Pueblo and the savage tribal Indians; but we now assert with confidence that, in every one of the numerous statutes, dating from the act of March 18, 1796 (1 Stat. 464, § 1), including the acts of March 26, 1804 (2 Stat. 277, 291), March 27, 1804 (2 Stat. 303, § 8), March 2, 1805 (2 Stat. 324), April 18, 1806 (2 Stat. 381), March 3, 1815 (3 Stat. 228), March 3, 1817 (3 Stat. 375), April 20, 1818 (3 Stat. 466), March 3, 1819 (3 Stat. 521), May 8, 1822 (3 Stat. 709, and elaborate note), and so forth, down to the Land Court Act, the "Indian titles" referred to as "extinguished," or to be "extinguished," or "unextinguished," had exclusive reference to the *quasi*-sovereign titles of savage or barbarous tribes then in occupation of divers parts of the Indian country, and had no possible reference to Indian Pueblos. Indeed, when Indian titles and their extinguishment became the object of congressional legislation, and until our war with Mexico, the status of Indian Pueblos was known only to a few of our citizens, and was utterly

ignored in our legislation. It is not easy, nor is it now necessary, to determine why the statute refers at all to the subject of "just" and "unextinguished" Indian titles, although, with reference to some reservations, such as the Navajo, Apache, Ute, and others, we may suggest that, pursuing an old and well established policy, Congress may have preferred to retain to itself jurisdiction of all controversies between citizens and tribal Indians, instead of subjecting those wards of the nation to the hazards of private litigation; just as, in the passage of the act of March 27, 1804, regulating certain grants of land, etc. (2 Stat. 303), it was provided (§ 8) "that no certificate should be granted for any lands [south of Tennessee] to which the Indian title has not been extinguished."

The language of the Land Court Act on this subject is *in pari materia* with similar phraseology adopted in the many enactments for a century past, and should properly bear the same construction. As to the status of the tribal Indians, the opinion of Chief Justice Marshall, in *Johnson vs. McIntosh*, 8 Wheat. 543, is of much historical importance.

2. The fourth subdivision of section 13 of the Land Court Act reads:

> "No claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress or under its authority."

Under this provision, the government now claims that Congress, by its confirmation of the Pueblo titles,

has lawfully and definitively acted on the "right" to so much of our land as has been included in the Pueblo surveys. But it is clear that Congress, by the very terms of the confirmation, *declined* to act upon the very "right" to any land, but, on the contrary, expressly excepted from its action all lawful adverse claims. Congress only relinquished or released any claim as between the United States and the Pueblos, but granted nothing. Of course, even such a release might operate as a new grant, if the land were public domain, but not otherwise. In the language of Mr. Justice Murray:

> "The confirmation of this [the Cuyamungue] grant would not be a claim allowed for land the right to which has hitherto been lawfully acted upon and decided by Congress or under its authority, for the reason that Congress did not undertake to decide who was the rightful owner of the land confirmed to the Pueblos of Nambé and Pojoaque, but on the contrary it is expressly stated in the patents issued to them that it is not to interfere with any prior right to the land which may have been held by other parties. The action of Congress on the claims and the issuance of the patents thereunder is nothing more than a release to them of whatever interest the United States might have in the land. In this case we have shown that the United States had no interest in the land to release. A confirmation of the grant to the extent of the boundaries would not in any way affect the rights of the Pueblos under their patents (if they had

any) as against the petitioners. They are fully protected by subdivision 5 of section 13 of the Act of March 3, 1891."

The only object of Congress in providing the restriction just considered was to prevent claimants whose pretensions had already been disposed of by statute from undertaking to renew them before the Land Court.

3. No argument is needed to show that the clause of section 8 of the act providing for the exception from a decree of confirmation of any land that "shall have been disposed of by the United States," has exclusive reference to the dispositions by *sale* or *grant* mentioned in section 14, and in respect of which due compensation is thereby sought to be awarded.

Fifth.

It is not the intent of the act to confer authority on the Land Court to pass definitively on the rights of adverse claimants to the same land as between themselves, and no decree of confirmation which it may render can debar adverse claimants from setting up their presumptions in the local tribunals, after all contest with the government has been concluded. Therefore, the decree in our case, so far from adjudicating on the Pueblo title in any binding sense, merely confirms our claim subject to any superior title which the Pueblos may be able to show on proper occasion. This is expressly stated in the decree. It was certainly not competent for the court, on finding our written title complete and per-

fect, to adjudicate that it should never be asserted against the Pueblo claims. No such outrage is justified by anything in the statute. It does not even authorize the court to decline jurisdiction, and that is the most that Congress could have constitutionally provided to our prejudice. It has never been the policy of the government to turn over controversies of citizens *inter se* to any of the numerous special tribunals established from time to time for the settlement of land claims under the political duty imposed by foreign treaties. The only purpose of such judicial establishments has been to determine the validity of private titles as against the sovereign power which granted them, and consequently against our government as successor in sovereignty; thus effecting a definite separation from the public domain of lands which ought in justice to be classed as private property. As to incomplete or executory private land claims this federal jurisdiction is exclusive, and its exercise is necessary to give to the private claimants due protection in the municipal courts, otherwise powerless to act definitively in determining the respective rights *inter se* of conflicting claimants. It has not been intended by this federal legislation to usurp the jurisdiction appropriate to the municipal courts. On the contrary, the intent has been to assist those tribunals to a full exercise of their judicial functions in respect of all matters of title in which the government should have been found by statute or judicial decree to have no interest. Hence the federal tribunals, in the settlement of California private land claims asserted against the government,

have declined to pass upon the comparative merits of conflicting claims, but have contented themselves with confirming every claim which has appeared regular on its face, upon the independent consideration of the muniments of title presented.

A glance at the government map of New Mexico will show numerous confirmed grants overlapping one another and thus presenting questions proper for the ordinary courts, but in which the government has no interest.

It was admitted in *Interstate Land Co. vs. Maxwell Land Co.*, 139 U. S. 569, 580, 588, that the plaintiff company might have prevailed had it shown a perfect grant.

Doe vs. Eslava, 9 How. 421; *Berthold vs. McDonald*, 22 How. 334.

In the language of Mr. Justice MILLER—

> "But the United States, in dealing with the claimants of lands under Mexican grants, which had come into the political control of our government by the treaty of Mexico, never made pretense that it was the owner of the lands so granted by Mexico. When, therefore, guided by the action of the tribunals which the government had established to pass upon the validity of these alleged grants, it issued a patent to the claimant, it was in the nature of a quit-claim—an admission that the rightful ownership had never been in the United States, but at the time of the cession it had passed to the claimant, or to those under whom he claimed. This principle has been more than once clearly announced in this court. The leading cases

are *Beard vs. Federy*, 3 Wall. 478; *Henshaw vs. Bissell*, 18 Wall. 268; *Miller vs. Dale*, 92 U. S. 478.

"Such a patent was, therefore, conclusive only as between the United States and the grantee, and was evidence that, as to them, the claimants had established the validity of the grant. * * * We do not think, therefore, that if defendant's survey and patent are based upon a superior Mexican grant, their rights are concluded by the prior survey of the plaintiffs."

Adam vs. Norris, 103 U. S. 591.

Multo fortiori, these considerations apply to a "complete and perfect title" of the class to which the Indian Pueblo patents were, by their express terms, made subject and subordinate.

Respectfully submitted,

JNO. H. KNAEBEL,
Of Counsel for Appellees.

No. 86. 13.

Supl. Brf. of Knaebel for Appe

IN THE

SUPREME COURT

Filed Jan 30, 1899.

OF THE

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SUPPLEMENTAL BRIEF IN BEHALF OF APPELLEES.

JNO. H. KNAEBEL,
Counsel for Appellees.

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No. 86.

SUPPLEMENTAL BRIEF IN BEHALF OF APPELLEES.

Our original brief, filed the seventh of November, 1898, was prepared in anticipation of the positions which the government might take, and recent inspection of the government's brief—filed the twelfth of January, 1899, and not brought to our notice until

after the submission of the case on appeal—indicates that we have already covered, in substance, all the points which the government has now presented. Nevertheless, availing ourselves of the leave graciously accorded to us by the court, we deem proper to submit the following addenda, in corroboration of our former argument.

In considering the statute in question, it must be borne in mind that the primary object of the statute is to ascertain and determine whether land claimed in any case as private property, under the treaties with Mexico, is in fact private property, or, on the contrary, is public property. In the latter case, the statute provides for the classification of the property as part of the public domain, but, in the former case, the statute submits the rights of the owners *inter se* to the operation of the ordinary law of the land. In other words, the government is not made by the act the champion of merely private rights of property in which it has no legal or beneficial interest.

The argument now presented by the government concedes: 1st, that the government has no interest in such parts of our grant as are embraced in the surveys and patents of the pueblos of Pojoaque and Nambé; and, 2nd, that it has no interest in the remainder of the land in controversy. It admits that our grant is complete and perfect, and belongs to us, save that it contends that, by *ex parte* legislative jugglery, the Indian pueblos have become vested, *as their private property*, with a part of our estate. By this proposition, the government states itself out

of court. United States vs. Morillo, 1 Wall. 706; Meander vs Norton, 11 Wall. 442.

Although the statute provides for the inclusion among the defendants, in a case before the Court of Private Land Claims, of persons having or claiming an interest in the lands in question, this provision is not essential to the jurisdiction of that tribunal, but ancillary only. For example: if, in a suit by A against the United States for the confirmation of a grant, a confirmation should result without the presence of any third parties, the confirmation would stand, even if third parties had or claimed interests in the premises adverse to A; but the confirmation would be subject to these qualifications, namely, that third persons claiming in privity with the *same title* would become entitled, by proper suit in equity, to secure due participation in the benefits of the confirmation, and third persons claiming adversely might, notwithstanding the confirmation, set up thereafter a superior title against it. Hayner vs. Stanly, 8 Sawy. 214, 224; Carpentier vs. Montgomery, 13 Wall. 480, third syllabus. In the first cited case (8 Sawy., page 224), Judge Sawyer said:

> "In U. S. vs. Morillo, 1 Wall. 707, it was assumed, though not expressly decided, that, when a grant has been once confirmed to one party and patented, the power of the board and court as to the land so patented is under the *same grant* exhausted."

The admission of third parties defendant to a suit in the Court of Private Land Claims is to enable them, as aids to the government, to show that the

plaintiff is not entitled to all the relief demanded, but it is not for the purpose of enabling such third parties, by a short cut, and without restriction by the mode of procedure imposed on plaintiff claimants, to secure an affirmative confirmation of conflicting claims set up by themselves. The statute tolerates no such confusion of procedure. All the relief that the court can give to such conflicting claimants is to limit the effect of its decree of confirmation of the plaintiff's grant, if found regular on its face, by a provision saving such conflicting claimants from prejudice, as was done in our case, and as has been done in all statutory confirmations. Indeed, the statute itself puts this saving clause, by implication, in every decree of confirmation.

The statute is even solicitous to express that confirmations thereunder shall be *res adjudicata* only between the government and the private parties, and that no rights of private claimants to the same land shall *inter se* be prejudiced. Not an intimation can be found in the statute to support the theory that, finding a tract of land to be private property, and so adjudicating it to be as against the government, the court has jurisdiction to pursue an inquiry as to the precise rights and claims of each private owner therein, and thus exercise such jurisdiction as is invoked by courts of chancery on the subjects of partition, foreclosure of equitable liens, quieting of titles, trusts, injunctions, receiverships, etc. Surely the government has no concern with private litigations of the character above suggested.

We repeat, that a mere glance at the map of New Mexico is sufficient to show how frequently the "lapping" or conflict of confirmed grants occurs. The books are full of adjudications based on such conflicts.

1.

Perusal of the archives Nos. 882 and 1342, mentioned on page 5 of the government's brief and found (in English) at folio 68, etc., of the record, will show that the government is under a strange misapprehension in assuming that it appears from these archives or anything therein contained that the pueblos of Pojoaque and Nambé, or either of them, ever held adversely or otherwise any part of the lands affected by the present controversy, or ever had a royal grant to the same.

A. As to archive No. 882:

(a) The first document (record, folios 69-74) is an order signed by Governor Don Diego de Vargas, the general purport of which is to provide for the restoration to Spanish settlers of lands of which they had been deprived by the rebellious Pueblo Indians during the revolution of 1680, but which contains no reference whatever to the lands now in question, although it provides for a grant to certain Indian pueblos of the tract at Chimayo, a place quite remote from the Cuyamungue tract.

(b) The second document (record, folio 74) is a report of the lieutenant of Governor Don Diego de Vargas, showing the progress made by him on the

twentieth of March, 1695, in the execution of the governor's said order, but it has no reference to the lands now in controversy, or to the pueblos of Pojoaque and Nambé.

(c) The third document (record, folio 75) is a report of the same lieutenant, which relates exclusively to the Chimayo tract and the further execution of the said order.

(d) The fourth document (record, folios 76-78) relates merely to an inspection by the said lieutenant, under the said order, of lands lying far remote from the premises in controversy.

(e) The fifth document (record, folio 78) is a minute of the return of the said lieutenant to Santa Fé, and his report to the governor of what he had done as aforesaid in obedience to the said order.

(f) The sixth document (record, folio 79) is a petition of the pueblos of San Lazaro and San Cristoval, asking permission to enjoy for another year the lands from which they had been compelled to remove by the said order.

(g) The seventh document (record, folios 80-81) is the governor's decree denying the last mentioned petition, and putting this denial on the ground that the lands referred to were needed for the use of Spanish settlers.

(h) The eighth document (record, folios 82-85) is a proclamation by Governor Diego de Vargas establishing the new town of Santa Cruz, and having no relevancy whatever to the present controversy. Its only reference to the pueblos of Nambé and Pojoaque is to refer to the latter, together with other

pueblos named, as among the boundaries of the new settlement of Santa Cruz, and it does not undertake to make the slightest reference to the extent or shape of any of the said pueblos. At the foot of this proclamation appears a note of its due publication.

(i) Next following in the said archive (record, folios 85-90) are three documents having exclusive reference to the settlement of the lands in the said town of Santa Cruz.

(j) The next document (record, folio 90) is a minute of the arrival of the governor at the pueblo of San Cristoval, and his enforcement of his former order requiring the Pueblo Indians to remove to the said tract of Chimayo.

(k) The next document (record, folio 91) is a minute of the installation of a missionary in the pueblo of Nambé, but it sheds no light on the subject of the boundaries of that pueblo.

(l) All the remaining documents (record, folios 92-96) relate exclusively to the subject of the emigrants from Mexico who were to form the Santa Cruz settlement, save some reference to the establishment of missions at Nambé and Santa Cruz, and to certain Indian hostilities.

B. As to archive No. 1342, found in the record at folios 96 to 121, it sheds no light whatever on the subject of the holdings of the pueblos of Pojoaque and Nambé, or either of them, except that the recited royal decree found at folios 99-101 seems to indicate that the pasture land of a pueblo was usually limited to a "common of one league" (*Ib.*, folio 99). A

large part of this archive bears date in 1783, upwards of fifty years after the date of our grant.

It must be borne in mind that our grant was the site of the abandoned pueblo of Cuyamungue. Possession was delivered in the presence and with the assent of all neighboring Pueblo Indians (*Ib.*, folio 131). As said by Mr. Justice Murray (*Ib.*, folio 134):

> "The quantity of land to which an Indian pueblo is entitled can only be determined by the grant itself. * * * The fact that the pueblo of Cuyamungue was abandoned did not extend the boundaries of the pueblos of Nambé and Pojoaque, or confer any rights on said pueblos to the land which had belonged to the pueblo of Cuyamungue. It was held by the governor and captain-general of the province of New Mexico, who had the right and power under the law to determine such questions, that the land occupied by the Indians of the pueblo of Cuyamungue, when abandoned by them, became royal public domain, and as such (he) granted it to the petitioners in 1731."

2.

The government is in error in assuming, at page 5 of its brief, that the record discloses any adverse possession by the Pueblo Indians of any part of the Cuyamungue grant. This assumption is a mere inference from the issuance of the patents; but we showed actual rightful possession of the grant.

Against our actual rightful possession no theoretic constructive possession can be asserted. (Hunnicutt vs. Peyton, 102 U. S. 333.)

3.

The two defendant pueblos were made parties by express order of the court (record, folio 124), and they certainly had their day in court. Whether or not they were served with process does not appear from the record, since all that appears on that subject is their own unsupported allegation contained in the motion of the acting Indian agent to vacate the decree (*Ib.*, folio 153), and this motion is not supported by affidavit or any evidence whatever. Every intendment is in favor of the action of the court. (Lutz vs. Linthicum, 8 Pet. 165.) At all events, the two Pueblos appeared generally, and they acquiesced, after such appearance, in the final decree of confirmation; for they have taken no appeal. It hardly lies in the mouth of counsel for the government to say that the pending appeal, taken in the name of the United States only, carries with it into this court the representation of the two pueblos by the government, and at the same time deny that the government represented those pueblos on the original trial.

4.

Hitherto it has been understood to be a rule in chancery procedure that one party to a cause cannot be heard to object, on appeal, to the fact that a third party has been omitted from the litigation, unless the object-

ing party make it appear that he was prejudiced by such omission. In the present case the government claims no interest, and it admits that we are entitled to all we claim, except so far as the pueblo surveys have intruded upon our lands. It does not assert that even one inch of the public domain is involved in this litigation. On the contrary, it expressly admits that all the land in controversy is private property, and it takes this appeal merely because it is irritated to find that the claimants of the Cuyamungue grant have the temerity to deny that the *ex parte* Indian surveys and patents are inoperative to destroy their prior rights. Surely the government states itself out of court by admitting that the United States has no interest whatever in the present controversy. It admits that our grant is complete and perfect, although it says that we ought to let the Indian pueblos have a part of it, and it further admits that the confirmations of the pueblos operated to relinquish and release all claims of the United States in the lands comprehended in the pueblo patents. The United States is foreclosed from objection: first, by the statutory confirmation in favor of the pueblos; secondly, by the judicial confirmation in favor of ourselves. How, in these circumstances, the government can have any except a Quixotic interest in the present appeal is inconceivable. By what law was the attorney-general ever made a knight errant for the vindication, at the expense of the government, of the private claims of one set of citizens against the private claims of another set?

In United States vs. Chaves, 159 U. S. 452, it appears from the statement of the case (*Ib.*, page 455) "that a large portion of said grant (the Cubero grant) had been disposed of by the United States to The Atlantic and Pacific Railroad Company, and that it was a necessary party defendant, and a misjoinder of parties was pleaded;" and also that "on August 29th, 1892, the court entered a decree confirming the grant, and denying the right of The Atlantic and Pacific Railroad Company to intervene except so far as their right of way was concerned, which right was admitted by the plaintiffs, from which decree an appeal was taken by the United States." In its opinion this court held, on the point suggested (*Ib.*, page 465), that "the objection that The Atlantic and Pacific Railroad Company, as grantee from the United States of a part of the tract in question, was a necessary party defendant, has not been pressed in argument, and we only notice it to say that, under the provisions of the fifth section of this act, the private rights of third parties are not affected by any proceeding or decree under said act."

5.

Fairness, however, compels us to admit that the government, in its brief, struggles to show that it had a pecuniary interest in this litigation, because, as it alleges, we were entitled to demand indemnity, at a rate not exceeding $1.25 per acre, for so much of our land as may be comprehended within the pueblo patents. It appears aggrieved because this right

of indemnity, so benevolently conceded to us, was ignored by the court below, as well as ourselves, and it therefore asks that the case be remanded to the court below in order that the amount of indemnity to be paid to us, out of the national treasury, may be ascertained and declared. In our candor, we have, on page 10 of our original brief, given our opinion that indemnity is provided by the statute only in respect of lands disposed of by the government under a technical "sale" or "grant," and that it is not intended to subject the government to any expenditure as indemnity for a mere relinquishment or release of claim by prior confirmations made expressly subject to all valid adverse rights. Some of our lands within the patented lines consist of barren craggy hills infested with crotaline monsters unapproachable unless by an Elsie Venner, and for these lands we should be most willing to accept $1.25 an acre from the government, if any such appropriation can legally be made in this case. At the same time, it is hard for us to understand how the government can insist on its interest in the present litigation, founded on this pretended indebtedness to us, when we deny that we are its creditors, and the court below, by its adjudication, has taken us at our word.

If the grant octopus, known as the Beales grant, considered by this court in Interstate Land Co. vs. Maxwell Land Co., 139 U. S. 569, had been a perfect grant, free from the bar of the Statute of Limitations, and as such had been established in the Court of Private Land Claims, would the government

have contended that the prior confirmation of the Maxwell land grant would, under the statute in question, give to the Interstate Land Co. the right to be indemnified out of the treasury of the United States for the large tract, amounting to hundreds of thousands of acres, in conflict between the two grants?

We can understand that, as matter of good faith, Congress should have been solicitous to protect its own unqualified grantees by the effort to compel a conflicting grant claimant to accept an indemnity in lieu of the lands sold or granted by the government (although it is anomalous to put the maximum of that indemnity at $1.25 an acre when the acres diverted might be fairly worth $10.00 each), but it appears to us incredible that, after merely "relinquishing" or "releasing" all claim to specific grant lands—*i. e.*, disclaiming interest therein—on the express condition that such relinquishment, release or disclaimer should not operate to the prejudice of any adverse rights, Congress should have intended, by the statute now in question, to enlarge the effect of such disclaimers by annexing substantially a warranty of title, and by impliedly repealing the very condition (in favor of prior rights) by which the disclaimers were originally qualified. On the contrary, we are persuaded that the statute in question is *in pari materia* with all confirmatory acts relating to New Mexico, and corroborative thereof. Indeed, the statute is inspired with the same general policy, namely, the safeguarding of the rights of the public, and non-interference with the claims and controversies *inter se* of private citizens.

6.

Section 9 of the statute contains the only provision which authorizes an appeal from a decision of the Court of Private Land Claims, and that section seems to confine the right of appeal to the government and the "claimant," thus apparently treating third parties as merely incidental factors; the authorized appellants being described as "the United States, in case of the confirmation of a claim, in whole or in part, and the *claimant*, in case of the rejection of a claim, in whole or in part."

In the Santa Fé case (165 U. S., at pages 716 and 717), this court, in rendering the decision, was not embarrassed by the absence of interested third parties.

7.

None of the cases cited on the government's brief are relevant or important to the present controversy. *Landes vs. Brant*, 10 How. 348, and several of the others, dealt with imperfect grants. In *United States vs. Moore*, 12 How. 209, the grant was held to be void. In that case, however, the court took occasion to anticipate the doctrine of *United States vs. Castant*, 12 How. 437, namely, that it is error to adjudicate against the government that a grant claimant has a right to indemnity for parts of his land already disposed of by the government, without identifying such parts and impleading the new holders.

The same remark is true of *United States vs. Davenport's Heirs*, 15 How. 1, where the court sustained the confirmation, but rejected so much of the

decree as allowed indemnity for lands previously sold or disposed of by the government, remitting the confirmee on this point to the political department.

In our case, no indemnity has been prayed or decreed, and no attempt made to debar the pueblos from any right whatever under their patents.

8.

Conclusion.

The contention of the government involves necessarily the absurd corollary that, had a third party set up in the court below an adverse claim, based only on the territorial Statute of Limitations (operative upon complete and perfect grants), it would have been the duty of the Land Court (unaided by a jury) to investigate, measure, identify and adjudicate the pretended adverse title; and so as to any number of independent squatter claims.

Respectfully submitted,

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